CHUNG PENG CHEE v. CHO YEW FAI & ORS.

[O. C. J. (Wilson, J.) February 20, 1954]

[K. L. — Civil Suit No. 9 of 1952]

Contract — Specific Relief (Malay States) Ordinance, 1950, s. 20(e) — Contract made by trustees either in excess of their powers or in breach of their trust cannot be specifically enforced — Contracts (Malay States) Ordinance, 1950, s. 66 — Person who receives any advantage under such agreement or contract bound to restore it or to make compensation for it to the person from whom received.

The defendants are the present trustees of Sin Sze Si Sze Ya Temple. In January 1945, an agreement was entered into between the plaintiff and the then surviving trustees of the Temple, for the sale of a shop-house belonging to the Temple for which the purchase-price was fixed and has been paid. The plaintiff, subsequent to the agreement was permitted to collect the rent from the tenant of the shop-house and did so until December 1, 1950, when as a result of a letter, the tenant paid rent to the trustees which he had previously done before the date of the agreement. However, under the trust deed of the Temple, the then surviving trustees were unable to sell the property in dispute even with leave of the Court.

Held: by section 20(e) of the Specific Relief (Malay States) Ordinance, 1950, the agreement was unenforceable and the defendants must therefore repay to the plaintiff the amount which the then surviving trustees received from him.

Held further: the plaintiff is accountable to the defendants for the rents and profits of the shop-house for the period from January 1945 to December 1, 1950.

ACTION.

B. J. P. Joaquim and *T. Rajendra* for the plaintiff.

D. G. Rawson for the defendants.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Wilson, J. : — The defendants, with the exception of the seventh defendant who is dead, are the present trustees of the Sin Sze Si Sze Ya temple in High Street, Kuala Lumpur. Until August, 1947, certain Chinese gentlemen, whose names are set out in the plaint, were the surviving trustees and, as such, proprietors of the said temple. In 1944, during the Japanese occupation, the surviving trustees were called upon by the Japanese Administration to pay a levy of fifty per cent. of the capital assets of the temple. I am satisfied that this claim must be treated as a matter of duress and that the payment of the claim was made under duress. It is common knowledge, a matter of which the Court may, in my opinion, take judicial notice, that failure to comply with the requirements of the Japanese government would almost certainly have resulted in disastrous consequences for those who failed to obey them. The levy was in fact made through the Selangor Overseas Chinese Association and resulted in the temple being indebted to this Association in the sum of about $187,581.26 in November, 1944. The surviving trustees thereupon, in order to raise the money to repay the Association, decided to sell a shop known as No. 133, High Street, Kuala Lumpur, by tender and they accordingly advertised for tenders for the purchase of the land and premises comprising the same. The land was comprised in Selangor Certificate of Title No. 2747, Allotment No. 58, section 30, in the town of Kuala Lumpur, on which are erected a temple and other buildings, among which is the shop house. The plaintiff's tender for the purchase of the shop house was $246,500 and his tender was accepted by the surviving trustees. Thereupon an agreement dated the 6th January, 1945 was entered into between the plaintiff and the surviving trustees for the sale of the shop to the plaintiff. By this agreement the price was fixed and has been paid. Under the agreement the purchaser undertook, as soon as possible after the execution of the agreement, to apply to the governor of Selangor for approval of the purchase, and if such was refused, the agreement was to become null and void. If the purchase was approved by the governor, and on payment of the balance of the purchase price, an application must be made to the government for the sub-division of the land so that a separate title could be issued by the government before the property was transferred. The surviving trustees agreed and undertook to do all acts and things and execute such documents as might be necessary or required to enable a separate title to be issued in respect of the said property. The surviving trustees did make an application for sub-division on the 22nd November, 1949. This was refused on the 9th January, 1950. The application was renewed on the 4th May, 1950 and was again refused on the 26th October, 1950. Thereupon the plaintiff's solicitors negotiated directly with Government and obtained approval for the sub-division of the land. In these circumstances I am not satisfied that the defendants did all acts and things as might be necessary or required to enable a separate title to be issued in respect of the said property.

However, under the trust deed of the temple the surviving trustees were unable, even with the leave of the Court, to sell the property in dispute. Whether or not the surviving trustees realised in 1944 that they were not able to sell this property I do not know, though the probability is that they did not realise it. The trustees could, of course, come to this Court if they wished to be excused from the consequences of a breach of trust if the agreement was enforceable and

had, in fact, been carried out. In fact, it has not been carried out and that is the reason for this case.

The plaintiff, subsequent to the agreement, was permitted to collect the rent from the tenant of the premises and did so until the 1st December, 1950 when, as a result of a letter, the tenant of the shop house paid rent to the trustees of the temple which he had previously done before the date of the agreement.

Mr. Joaquim on behalf of the plaintiff has argued that the beneficial ownership of the shop house has passed to the plaintiff and that the purchaser of trust property cannot be divested of ownership because the transfer was in breach of trust. He has also argued that it is open to the trustees to apply to the Court for relief for the consequences of the breach of trust which they have not done. In my opinion, that might apply if the transfer had been completed innocently and the trustees were sued for breach of trust, but in this case the transfer was never completed, and it appears to me that it is necessary to consider whether the agreement was, as submitted by Mr. Rawson, null and void *ab initio*.

By section 20(e) of the Specific Relief (Malay States) Ordinance, 1950, a contract made by trustees either in excess of their powers or in breach of their trust cannot be specifically enforced. By section 2(g) of the Contracts (Malay States) Ordinance, 1950, an agreement not enforceable by law is said to be void, but under section 66 of the same Ordinance when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. Clearly, if the agreement cannot be enforced, the defendants must repay to the plaintiff the amount which the surviving trustees received from him. Whether or no this amount should be revalued in accordance with the schedule to the Debtor and Creditor (Occupation Period) Ordinance, 1948, is a matter which I have not got to decide in this case.

The plaintiff in his amended statement of plaint claims in the alternative for an indemnity against the defendants personally and for a declaration that the plaintiff is entitled to an indemnity for loss or damage sustained by him by reason of the failure of the contract. If the contract is null and void *ab initio*, as in my opinion it was, I cannot see how the plaintiff can succeed on his alternative claim.

The defendants by way of counterclaim ask for a declaration that the plaintiff is accountable to the defendants for the rents and profits of the said shop house for the period from 5th January, 1945 to the 1st December, 1950, subject to any amount payable by the the defendants to the plaintiff under section 66 of the Contracts Ordinance. In my opinion, they are entitled to such a declaration and to an account of such rents and profits.

The plaintiff's claim is dismissed with costs and the counterclaim of the defendants must be allowed with costs. If the parties are unable to agree as to the amount of the rents and profits received by the plaintiff, the Senior Assistant Registrar must hold an enquiry and determine the amount.

Order accordingly.

Solicitors for the plaintiff: *Rajendra & Teik Ee.*
Solicitors for the defendants: *Shearn, Delamore & Co.*

HAJI AHMAD v. SADAH (f).

[O. C. J. (Spenser Wilkinson, J.) March 5, 1954]

[Penang — Civil Suit No. 260 of 1952]

Malicious prosecution — Damages necessary to support action for — Maintenance proceedings — Whether criminal or civil.

In order to support an action for malicious proceedings it is necessary to prove damage and that there are three sorts of damage, any one of which is sufficient to support the action. The first is damage to a man's fame; the second is damage to his person; and the third is damage to his property; and the action is maintainable if, and only if, it falls within one or the other of these three heads.

It is common ground that maintenance proceedings under the Married Women and Children (Maintenance) Ordinance, 1950 (F.M.), although criminal in form are civil proceedings in substance.

Cases referred to:—

(1) *Wiffen v. Bailey & Remford Urban Council* (1915) 1 K.B. 600 at 606.

(2) *Savile v. Roberts* 1 Ld. Raym. 347.

ACTION FOR DAMAGES.

Jag-Jit Singh for the plaintiff.

Eusoffe Abdoolcader for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — This was an action for malicious prosecution based upon maintenance proceedings instituted by the defendant against the plaintiff in the Magistrate's Court at Balik Pulau. Those proceedings terminated in favour of the present plaintiff. Counsel for the defendant at the outset submitted in effect that the Statement of Claim